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Supreme Court, U.S.
FILED
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No. 07-655

In The

Supreme Court of the United States

ARTHUR JONES, MONICA RAY and
CITY OF MILWAUKEE,

Petitioners,

v.

ALFONSO MORALES and
DAVID KOLATSKI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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ISSUE PRESENTED

Is a public employee who is compelled in sworn testimony to speak about activities within that role not speaking "as a citizen" and therefore not entitled to assert the protections of the First Amendment?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007) and is reproduced in the appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, No. 07-556, at Appendix pages 1 to 36. The United States Court of Appeals for the Seventh Circuit subsequently issued unpublished orders denying the petitions for rehearing and rehearing *en banc* of both the petitioners and respondents on August 17, 2007, and those orders are also reproduced in the appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, No. 07-556, at Appendix pages 101 and 102. Preceding the appeal, the United States District Court for the Eastern District of Wisconsin issued unpublished decisions denying the defendants' motion on the pleadings (appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, No. 07-556, Appendix pages 92 to 100), denying in part the defendants' motion for summary judgment (appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, No. 07-556, Appendix pages 64 to 91), and denying the defendants' post-trial motions for judgment as a matter of law and for a new trial (appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, No. 07-556, Appendix pages 37 to 63).

STATEMENT OF THE BASIS FOR JURISDICTION

The Court of Appeals for the Seventh Judicial Circuit issued its Opinion on July 17, 2007. On August 17, 2007, the Court of Appeals for the Seventh Judicial Circuit issued an Order denying the petitions for rehearing and rehearing *en banc* of both the petitioners and the respondents. The Supreme Court has jurisdiction to review this writ pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except

that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. The Parties' Background

At the time of the trial below, the plaintiff, Alfonso Morales, was a Lieutenant of Detectives assigned to the Criminal Investigation Intelligence Division of the Milwaukee Police Department. R. 143:495. Morales achieved this promotion through the testing process. *Id.* at 495-6. He had become a Lieutenant in December 2003. *Id.* at 496. He achieved that rank when the Defendant, Arthur Jones, was still the Chief of Police for the City of Milwaukee, Wisconsin. *Id.*

Prior to that time, Morales had risen to the rank of Detective, also through a testing process. *Id.* He had achieved that position in June 1999. *Id.* at 497. Prior to that, he held the rank of a Police Officer. *Id.*

Morales became a Police Officer in September 1993. *Id.* He was first assigned as a Police Officer to

the Vice Control Division in the spring of 1997. *Id.* at 497-498. Prior to his assignment in the Vice Control Division, Morales had been assigned to the District 2 Police Station. *Id.* at 498-499.

Morales described his work as a Police Officer in the Vice Control Division as doing "a lot of work mirroring a detective" and, explained that the detective to whom he was assigned actually viewed Morales as "an acting detective." *Id.* at 499. "We investigated drug investigations from start to end[, . . .] were involved in the surveillance, the investigation of[,] the recovery of evidence, the execution of search warrants, interrogations, processing these . . . arrests through District Attorney's Office, requesting District Attorneys . . . Office for advice on certain methods to utilize on investigations, and completing it through the court system, whether it be a trial or through guilty pleas." *Id.* at 499-500.

As of the time of the trial, the Plaintiff, David Kolatski, was a Detective with the Milwaukee Police Department. R. 146:945. He was promoted to that rank in May of 2001. He had previously achieved the rank of Police Officer in the department in November of 1988. *Id.*

He was first assigned as a Police Officer to the Vice Control Division in September 1996. *Id.* at 945-946. Prior to that assignment, Kolatski also had been assigned to District No. 2. *Id.* at 946.

The Defendant, Arthur Jones, first started with the Milwaukee Police Department in October 1967.

R. 143:331. He was a Police Officer in the Department from 1967 to 1978, was promoted to the position of Detective in January 1978, was once again promoted to the position of Lieutenant of Detectives in 1987, and later promoted to the position of Captain in 1989. *Id.* at 331-333. In 1992, Jones was promoted to the rank of Field Deputy Inspector, and given the responsibility of being in charge of the Department in the evenings. *Id.* at 333. Following two other assignments in that same rank, Jones ultimately was nominated and promoted to the rank of Chief of Police in November 1996. *Id.* at 334-335. In that position, he was responsible for overall supervision of police personnel, including civilian personnel, a total of approximately 2,900 people. *Id.* at 335. By statute, he was also charged with enforcing all of the laws of the state and ordinances of the city, ensuring the efficiency and good conduct of the Department, and responsible for effectively managing the Milwaukee Police Department within a budget of approximately $159,000,000.00. *Id.* at 335.

At the time of the district court trial, the Defendant, Monica Ray held the position of Deputy Chief of the City of Milwaukee Police Department. R. 141:135. She has held that position since March of 1998. *Id.* The Vice Control Division was under her command as Deputy Chief. *Id.*

Ms. Ray is one of six children, raised by her mother in a housing project in Hammond, Indiana. R. 142:198-199. Ever since she could remember, "maybe from the time of 12 or 13, my older brother – he's not

the oldest, but the older brother, Vincent Ray, who brought us here today, is a heroin addict." *Id.* at 199. Of her family, Vincent is "the only one that has ever engaged in that kind of activity." *Id.*

Ms. Ray graduated from Marquette University in 1979. *Id.* at 200. As a result of her subsequent work with battered women, she came in contact with law enforcement officers and ultimately attended and graduated from the Milwaukee Police Academy in 1984. *Id.* at 200-201. She remained at the rank of Police Officer for a number of years, including an assignment as a Police Officer in the Vice Control Division, until she was promoted to Detective in 1990. *Id.* at 201-205. She worked for a period of time as a Detective in the Vice Control Division until she was promoted to Detective Lieutenant in 1993. *Id.* at 205. Chief Jones' predecessor promoted her to Captain in 1995. *Id.* at 206. In 1997, Chief Jones promoted her to the position of Deputy Inspector. *Id.* at 207. In that assignment, she was in charge of the Special Operations Bureau, which included the Vice Control Division, the Patrol Support Division, and the Support Units, such as Patrol Horse Units and Police Boats. *Id.* at 207. She was ultimately reclassified into the position of Deputy Chief in 1998. *Id.* at 208. At the time of the trial, she was assigned as Deputy Chief of the Administration Bureau which provides technical services and other statistical support to the Department, as well as Police Fleet Maintenance and Facility Maintenance. *Id.* at 208-209. There are approximately 600

individuals assigned to that particular bureau. *Id.* at 209.

B. Background Events

Morales was working in the Vice Control Division on March 22, 1998. R. 143:503. Lieutenant of Detectives Edward Liebrecht assigned to Morales and Detective Joseph Link an investigation involving Vincent Ray, the brother of Deputy Chief Monica Ray. *Id.* Liebrecht advised Link and Morales that a landlord had complained about Vincent Ray; the landlord believed that Vincent Ray was utilizing one of the landlord's houses as a drug house. *Id.* Liebrecht also explained that Deputy Chief Ray had been notified of this, "and that she stated to investigate that as we would any other complaint." *Id.* Liebrecht further advised both Link and Morales that Vincent Ray "may also have warrants for his arrest." *Id.*

Morales conducted a wanted check on Vincent Ray and discovered that he was wanted on two felony warrants. *Id.* at 504. Morales provided that information to Link and Liebrecht. *Id.* Liebrecht then instructed Link and Morales to meet with the landlord. *Id.* at 505.

Morales explained that it was not a part of their "normal duties" to look for wanted persons. He and Link did that, however, because "[t]hat was our instructions." *Id.*

Link and Morales met with the landlord and toured the property in question. *Id.* at 505. Link and Morales reported this information to Lt. James Shepard, who, in turn, instructed them that "locating Vincent Ray . . . was going to be our priority and arresting him on warrants, to set aside any other investigation we had [. . . a]nd that . . . that direction came down from the Chief." *Id.* at 507.

Link and Morales worked with the landlord to try to arrange a meeting so that they could arrest Vincent Ray. *Id.* at 509. The plan did not work, however, and Vincent Ray never contacted the landlord. *Id.* at 510-11.

On April 6, 1998, the landlord contacted Morales and related that the landlord had observed Vincent Ray working on an automobile on a city street. *Id.* at 511. Because Link was then going to be involved in executing a search warrant, and because Morales and Kolatski were not then involved in that effort, it was these two officers who went to attempt to locate Vincent Ray. *Id.* at 511-12.

Morales and Kolatski proceeded to the location provided by the landlord, watched the area in question for a period of time, and eventually arrested Vincent Ray. *Id.* at 514. Other officers conveyed Vincent Ray to the Police Administration Building. *Id.* at 515. Kolatski and Morales, in the meantime, went to the scene of the search warrant to meet Detective Link to "relate the information to" him and then proceed to the Police Administration Building in

order to prepare reports relating to the arrest. *Id.* at 515. In particular, with regard to Morales, his purpose in meeting with Detective Link was that Link "was [Morales'] partner, and [Link] was going to be conducting the interrogation of Vincent Ray." *Id.*

On the way back to the Police Administration Building, Link, Kolatski and Morales stopped at a restaurant. *Id.* at 516. They ordered some chicken from the owner of the restaurant, John Mullarkey. *Id.* Other than ordering the food from Mullarkey, Morales had no conversation with him, but, instead, went to the bathroom. *Id.*

While Morales was gone, Kolatski started to tell Link "basically what happened." R. 146:956. Kolatski recounted, in particular, that they had watched a car, that Vincent Ray had gotten into it, and that the officers had pulled him over and taken him into custody without incident. *Id.* Kolatski did not use Vincent Ray's name in recounting this incident. *Id.* at 957. He did, however, "half-heartedly" tell Link that "it was nice working with him." *Id.* Kolatski did that because he "had a bad feeling about this whole situation, the way everything kind of transpired," that is, that this involved "the deputy chief's brother, . . . drug dealing allegations, drugs recovered, just not a situation you always want to be in." *Id.*

At that time, the restaurant owner was standing at the cash register, at the other end of the counter. The owner asked whether Kolatski had thrown the Chief in jail. *Id.* at 957-958. Kolatski responded that

they had not done that. *Id.* The owner then asked whether they had thrown Deputy Chief Monica Ray in jail. *Id.* Kolatski once again denied that. He did admit that they had "ended up arresting a relative of a higher ranking department member, but never any names were mentioned." *Id.* at 958.

Mullarkey then volunteered that "two weeks ago he had been making a delivery to Monica Ray's house, whom he knew by first name; and said that when he made this delivery, that the Chief was there; and that during the course of this delivery, a person had come out of the backroom and had he not been in the company of two police officers, he would have been concerned about getting robbed." *Id.* Link then became involved in the conversation and asked the owner what the individual looked like. *Id.* at 958-959. The owner provided a description of the individual including the individual's complexion and the fact that he had tattoos. *Id.* at 959. The officers then received their order and left after Morales had returned from the bathroom. *Id.*

Kolatski became concerned subsequently because Mullarkey's story implied that at least the Chief may have been involved in harboring an individual who was wanted on felony warrants. *Id.* at 960. On the ride from the restaurant to the Police Administration Building, Kolatski informed Morales as he was talking to Link of what they had learned from Mullarkey. R. 143:517. It was Morales' understanding that the individual who was identified by complexion and the

presence of tattoos matched the description of Vincent Ray. *Id.* at 517-518.

At some point in the process of returning to the Police Administration Building, a supervisor, Lt. Habeck, was informed of Vincent Ray's arrest. R. 146:961; R. 145:722-723. Upon their return to the Police Administration Building, Habeck indicated to Link and Morales that he spoken to Deputy Chief Ray and that "she did not want her name or address in any of the reports" that the officers had to file in connection with this arrest. R. 143:519-20; R. 135:723. Link eventually put Deputy Chief Ray's name on the appropriate report form, but simply put down as her address "County of Milwaukee." R. 145:727.

It was Morales' responsibility to collect all of the reports relating to Vincent Ray's arrest because he "was the one designated to take this over to the District Attorney's Office for prosecution." R. 143:525. These reports are not only relied upon by the prosecutor's office, but if the officer is presenting a case for prosecution, the officer needs "to provide this as discovery to the District Attorney, or the Assistant District Attorney." R. 143:527-528. All of the necessary reports were completed at the end of the shift on the evening of April 6, 1998 prior to the officers leaving for home. *Id.* at 530-531.

On the morning of the following day, April 7, Morales was going to take all of the reports over to the prosecutor's office from where they had last been left on his desk. *Id.* at 531. In taking the materials

over to the prosecutor's office, he observed that one report, the "Pedigree" was missing. *Id.* at 531-532. This is the report containing the information regarding Vincent Ray's relatives and their addresses, including, of course, the information concerning Deputy Chief Ray. R. 145:727.

Morales met with Assistant District Attorney John Chisholm and provided him with a "brief synopsis" of Vincent Ray's arrest and the potential charges. R. 144:545. Chisholm reviewed the reports, noted that the pedigree was missing, and asked about it. *Id.* Morales then decided "to inform Asst. DA John Chisholm of my concerns regarding what had transpired from the beginning to the end of the arrest of Vincent Ray" including that they had been informed that the arrest was a priority, that they had been unable to successfully arrange to arrest Vincent Ray in attempting meetings with the landlord, that they had been advising their superiors of the progress of the arrest efforts, that those reports were going up the chain of command and, most significantly, the allegations made by Mr. Mullarkey at the restaurant. Morales also informed Chisholm of Habeck's directions concerning Deputy Chief Ray's identifying information on the reports. *Id.* at 536-547. Morales determined to provide this information to Chisholm because he is a prosecutor for the County, because he would be more knowledgeable on how to handle this situation, because it involved the third in command in the police department and the police chief and because it concerned claimed misconduct. *Id.* at 547.

Morales felt that his only option other than reporting this matter to the District Attorney's office was to have ignored it. *Id.* at 549. If he had ignored these allegations of potential criminal acts, however, he would have admittedly been violating police department policy.

Members of the District Attorney's Office informed Morales that they wished to speak to Detective Link. R. 144:550. Link and Morales later returned to the District Attorney's Office. *Id.* at 552-553. Because of police department regulations, Link informed the prosecutors that they were obligated to inform their superiors of the prosecutors' investigation into the Mullarkey allegations. *Id.* at 553-554.

Following the meeting with the prosecutors, Link and Morales went to the Police Administration Building and met first with Lieutenant Liebrecht, and then later were called in to Deputy Chief Ray's office. *Id.* at 554. Morales recounted to Deputy Chief Ray what he had informed the prosecutor's office and about their investigation. *Id.* at 554-555.

In 1998, Deputy District Attorney Jon Reddin was one of the prosecutors who was responsible for the investigation of police officers accused of crime. R. 143:401-402. Reddin had been an assistant in the office since 1973 but had been a deputy since 1992. *Id.*

Deputy District Attorney Reddin recounted that shortly after the allegations had been made, Mullarkey backtracked from them. *Id.* at 411. In fact, Mullarkey had retracted his allegations by the time that

the Deputy District Attorney spoke to Deputy Chief Ray. *Id.* Reddin recalled that in his interview with Deputy Chief Ray, she denied any wrongdoing. *Id.* at 411-412. By the end of his investigation, Deputy District Attorney Reddin concluded that Chief Jones did not know that Vincent Ray was wanted. *Id.* at 412. In fact, much more was clear from this investigation.

On April 7 and 8, Assistant District Attorney Chisholm and an investigator from his office interviewed Mullarkey and "prepared reports regarding that interview." *Id.* at 800-803, 806. They asked Mullarkey whether or not he had made any deliveries to Deputy Chief Ray's residence within the last month prior to April 7, 1998 and Mullarkey told them that he believed that he had not made any deliveries whatsoever since January, quite obviously outside the time frame in which the officers were searching for Vincent Ray (and contrary to what Mullarkey had said to Link and Kolatski). *Id.* at 804, 839-840. Chisholm and the investigator then asked Mullarkey to produce delivery receipts, which he did, and which indicated that he had made deliveries as late as March. *Id.* at 804-805.

There was a follow-up interview that was conducted which included a search for April receipts. *Id.* at 805-806. That produced a receipt for a delivery to the subject address in March. *Id.* at 806-807. Nonetheless, as detailed below, this discovery only further undermined Mullarkey's credibility.

Chisholm acknowledged that Mullarkey's change in story from the April to the January delivery dates did not make him very credible. *Id.* at 840. When Chisholm and his investigator conducted their follow-up interview on April 8, the investigator spoke to one of the other delivery persons who actually claimed to have delivered the food to the Ray residence on March 28. *Id.* at 846. It was another person, and not Mr. Mullarkey who made the delivery. *Id.* at 847. The investigator recounted that this delivery person indicated that he had never seen any male subjects in the house when he went there to make any deliveries. *Id.* at 847-848. The investigator obtained this information from the delivery person while Mullarkey was not present in the restaurant. *Id.* at 848. Based upon this second interview, "there was nothing that led [the prosecutors] to believe that there was prosecutable merit in the . . . investigation . . . " *Id.* at 849.

The Pedigree report that was missing from the materials brought by Morales to Chisholm was subsequently located. R. 144:609, 615. Morales cannot explain who found it, where they found it, or how it was lost. *Id.* at 615. He could not, in fact, even recount who, where or how it was found. *Id.* He did acknowledge, however, that it was his obligation to get the prosecutor every report that exists or to explain to him or her why something was missing. *Id.* at 614.

Chief Jones signed an eight-page order dated April 17, 1998, and transferring a number of officers. R. 125 (Exhibit 4). Among those individuals

transferred on that order was David Kolatski, who was transferred from the Vice Control Division to Police District Station No. 1 on the same shift. *Id.*, p. 4; R. 146:964-965.

C. Significant Events Relating to the Defendants' Petition

It was not until approximately nine months later, pursuant to an order dated January 22, 1999, and listing four pages of police officers, that Alfonso Morales was transferred from the night shift in the Vice Control Division to the night shift at a district police station. R. 125 (Exhibit 5), p. 3; R. 144:561. Morales' transfer came approximately one month after he gave deposition testimony in the case of *Kuchenreuther v. Jones*. R. 144:564.

Morales was subpoenaed to the deposition by the attorney representing Officer Kuchenreuther, the same attorney now representing both Morales and Kolatski. R. 51, Attachment (Deposition exhibit 7), pp. 2, 5. Morales testified that he was reluctant to appear, and that he feared that the chief would scotch his pending promotion to detective (something which, of course, did not happen as noted above). *Id.*, pp. 75-76.

During the course of that deposition, Morales was questioned about the events surrounding Vincent Ray's arrest, Mullarkey's allegations and opined that Kolatski had been transferred as a result of Vincent Ray's arrest. *Id.* Deputy Chief Ray indicated that she had received a telephone call from a City Attorney

who wanted to know why Kolatski had been transferred. R. 142:184. She recounted that the attorney made this inquiry because Kolatski had given a deposition in the Fall of 1998. *Id.* at 183-184. She denied being aware of any depositions by Morales or Link in that same litigation in December of 1998. *Id.* at 184.

D. The Basis for Jurisdiction in the Court of First Instance and Subsequent Proceedings

Morales and Kolatski filed a complaint alleging a violation of their First Amendment rights in the United States District Court for the Eastern District of Wisconsin on May 20, 2000. R. 1. In bringing this action in the District Court, Morales and Kolatski relied upon 42 U.S.C. § 1983 and the District Court had jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331 and 2201.

The defendants filed a Motion for Judgment on the Pleadings. R. 23. Following briefing, the District Court denied that motion in an Order dated September 7, 2001. Appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, No. 07-556, Appendix pages 92 to 100. Following discovery in this matter, the defendants filed a Motion for Summary Judgment. R. 41. Following briefing of that motion, the District Court denied the Summary Judgment Motion in large part. Appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, No. 07-556, Appendix pages 64 to 91.

The matter was then tried to a jury beginning on November 14, 2005. R. 141-148. The jury returned a verdict in favor of the Plaintiffs and against the Defendants, Jones and Ray, on November 18, 2005. R. 120. On Saturday, November 19, 2005, the District Court then approved a judgment entered by the Deputy Clerk in favor of the Plaintiffs and against the Defendants, Jones and Ray; the Clerk entered it on Monday, November 21, 2005. R. 121. On December 6, 2005, the Defendants filed motions to alter the judgment in the matter, for judgment as a matter of law, and for a new trial. R. 130. Following briefing on those motions, the District Court denied those motions and granted in part the Plaintiffs' Motions for Attorney's Fees and Costs. Appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, No. 07-556, Appendix pages 37 to 63. The Defendants, Jones and Ray, then filed a Notice of Appeal on February 7, 2006. R. 139.

The United States Court of Appeals for the Seventh Circuit issued its opinion on July 17, 2007. Appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, No. 07-556, Appendix pages 1 to 36. In that opinion, the majority of the three-judge panel determined that none of Kolatski's speech was entitled to First Amendment protection, that Morales' statements to the prosecutor were also unprotected, but that his deposition testimony was protected and that the matter had to be returned to the district court for a new trial on just that portion of Morales' claim. The third member of

the panel concurred in the judgment with respect to Kolatski, but dissented as to Morales, concluding that all of his speech was entitled to protection. The United States Court of Appeals for the Seventh Circuit subsequently issued unpublished orders denying the petitions for rehearing and rehearing *en banc* of both the petitioners and respondents on August 17, 2007. Appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, No. 07-556, at Appendix pages 101 and 102.

ARGUMENT

I. THE COURT SHOULD GRANT THIS PETITION TO RESOLVE THE DISPUTED AND SIGNIFICANT QUESTION OF WHETHER THE FIRST AMENDMENT PROTECTS A PUBLIC EMPLOYEE COMPELLED TO SPEAK ABOUT ACTIVITIES IN HIS OR HER POSITION IN SWORN TESTIMONY

The American democracy demands that public employees account for and explain their efforts in carrying out their duties in official statements and sworn testimony. This is as much a part of the duties that such employees are expected to perform as is the actual day-to-day activities in their work. This Court should accept this petition to resolve a conflict between the holding of the seventh circuit below and another circuit's conclusion about such speech. It should also accept this petition because the courts of appeal have been inconsistent and uncertain in their

determinations of whether such speech should receive protection.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court firmly established that public employees do not give up their First Amendment right to speak on matters of public interest simply because of their public employment. On the other hand, this Court there also acknowledged that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.*, 391 U.S. at 568. As recognized by this Court in that decision "[t]he problem in any case is to arrive at a balance between the interests of the teacher, *as a citizen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (emphasis supplied).

Until this Court decided *Garcetti v. Ceballos*, ___U.S.___, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), there was a significant question concerning whether the phrase "as a citizen" stood as a limitation precluding protection for an employee's speech that was uttered pursuant to the employee's job responsibilities. *See Ceballos v. Garcetti*, 361 F.3d 1168, 1187-88 (9th Cir. 2004) (dissent) (discussing the various and sometimes conflicting conclusions of the courts of appeals concerning the significance and application of the test of speech "as a citizen"). *Garcetti* resolved

that question, at least in part, holding unequivocally that an employee is not protected when he or she speaks as a part of "official duties," and thereby reemphasizing the significance of the issue of whether the employee spoke "as a citizen." *Garcetti*, 126 S.Ct. at 1958-1960.

What this Court did not have to confront in *Garcetti* is the situation in which a public employee is required to speak about his or her work activities, not as part of an effort to further those obligations, but simply to serve the purpose of another with an interest in the manner in which they were executed. This is, of course, a common occurrence. In responding to legislative oversight, government employees at all levels must appear and explain their activities. Citizens and other employees, questioning the actions of a certain employee, may compel a deposition, testimony in a court or administrative proceeding. In each such instance, the employees are expected as a part of the obligations of their position to respond and to provide testimony as required. While such statements or testimony may not directly further the governmental functions that the employee has been hired to perform, they nonetheless are neither done to further the employee's personal goals or beliefs nor are they made without connection to those duties which the particular government entity expects the employee to fulfill. In other words, these are among "the duties an employee actually is expected to perform . . . ." *Garcetti*, 126 S.Ct. at 1962.

That particular type of circumstance is presented by a portion of this case. Morales gave deposition testimony in the separate unsuccessful First Amendment lawsuit brought by another Milwaukee police officer, Carol Kuchenreuther, and against Chief Jones as a result of her transfer. *See Kuchenreuther v. City of Milwaukee*, 221 F.3d 967 (7th Cir. 2000). The Seventh Circuit Court of Appeals concluded that Morales' deposition testimony was not a part of his "official duties." Appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, pages 15-16. It concluded that such a testimonial appearance was "not what he was employed to do." *Id.*, p. 16. It went on further to conclude that it was protected even though "Morales testified about speech he made pursuant to his official duties" *Id.* It deemed it an "oddity" that "speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected." *Id.*

This holding, however, places the appellate court below at odds with another court of appeals. In *Morris v. Crow,* 142 F.3d 1379 (11th Cir. 1998), the Eleventh Circuit Court of Appeals held that a police officer's traffic report and civil-lawsuit deposition testimony concerning a fellow officer's improper conduct in a high-speed chase did not constitute protected speech. *Id.*, 142 F.3d at 1383. Morris had investigated an accident involving another officer as a part of Morris' duties; Morris had prepared a traffic report indicating that the officer involved in the

accident had been traveling more than 130 miles per hour in a 50 mile per hour zone and failed to use the requisite blue emergency lights when the officer collided with a citizen's car, killing him. *Id.*, 142 F.3d at 1381. In a subsequent wrongful death lawsuit, Morris was deposed, "reiterated his earlier observations and additionally stated that if the officer were traveling the legal speed limit, there was a 'great possibility' the accident would not have occurred." *Id.* The eleventh circuit concluded, in particular, that the deposition testimony was unprotected; in determining that Morris in the deposition was not speaking as a citizen on a matter of public concern, the appellate court explained that there was no evidence that "Morris gave deposition testimony for any reason other than in compliance with a subpoena to testify truthfully in the civil lawsuit regarding the November 1989 accident." *Id.* 142 F.3d at 1382. "Morris's testimony cannot be characterized as an attempt to make public comment on the sheriff's office policies and procedures, the internal workings of the department, the quality of its employees, or upon any issue at all." *Id.*

In considering Morales' First Amendment claim, the majority opinion below says nothing of the decision in *Morris*. The dissent addresses the case, attempting to dismiss it by arguing that Morales was in the deposition engaged in some effort to bring to light what the dissent describes as "a matter of grave public concern" ("*possible* government corruption") and because he had "no work-related duty to speak."

Appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, page 32. This analysis ignores, first of all, the significant circumstances of this particular case. The district attorney's office months before the deposition had uncovered that the allegations of "possible government corruption" were (with a slight apology to the accuser) nothing but malarkey. Morales either knew or should have known by the time of his deposition that the prosecutor had debunked Mullarkey's claims. Significantly to this petition, furthermore, there is no basis upon which to conclude that Morales' deposition testimony was either voluntary or unrelated to his work. It was, in fact, related in almost the identical manner in which Morris' deposition was related to his duties. Morales was compelled to testify; he was reluctant to appear and did so only in response to a subpoena. Like Morris, Morales did nothing more than provide testimony about his professional activities related to the arrest and the pursuit of a prosecution of Vincent Ray. Morales did also testify as to his opinion as to the reason for Kolatski's transfer but this speech is not protected by the First Amendment because, in the absence of any well-founded allegations of public misconduct, it constitutes nothing more than speech about a matter of private rather than public concern. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). This Court should accept this petition to resolve the conflict between the decision below and that of the eleventh circuit in *Morris*.

To the extent that the courts of appeals have protected public employees' speech in the context of sworn testimony, such protection has been inconsistent, and usually, although not always, being granted when the employees have voluntarily come forward to provide testimony on some issue or on some party's behalf. *See Konits v. Valley Stream Central High School District*, 394 F.3d 121 (2d Cir. 2005) (teacher has viable First Amendment claim in her voluntary assistance and listing as witness on behalf of another school employee's gender discrimination claim); *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) (police academy instructors have viable First Amendment claim relating to expert testimony that they voluntarily provided in private excessive-force lawsuits against officers in various Texas law enforcement departments). On the other hand, some of the appellate courts have not extended such protection to employees who volunteer testimony related to their employment. *See Kirby v. City of Elizabeth City, North Carolina*, 388 F.3d 440 (4th Cir. 2004) (police officer cannot assert First Amendment claim relating to testimony he voluntarily provided in administrative disciplinary hearing on behalf of another officer relating to the use of a squad car); *Tedder v. Norman*, 167 F.3d 1213 (8th Cir. 1999) (voluntarily-provided expert testimony in excessive-force suit by law enforcement trainer not protected speech, but only on *Pickering* grounds); *Green v. Philadelphia Housing Authority*, 105 F.3d 882 (3rd Cir. 1997) (police officer's voluntary testimony as a character witness in criminal proceeding against reputed organized crime

figure unprotected, also on *Pickering* grounds). Still other appellate courts have provided protection to public employees called and apparently compelled to testify about their work in the public sector. *See Herts v. Smith*, 345 F.3d 581 (8th Cir. 2003) (subpoenaed testimony by public employee about activities of her agency in a desegregation lawsuit was protected speech); *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225 (2d Cir. 2003) (testimony by jail administrator about problems with jail's mental health services in nurses' First Amendment lawsuit against other county officials is protected); *Meyers v. Nebraska Health and Human Services*, 324 F.3d 655 (8th Cir. 2003) (statements by case worker during hearing on proper placement of foster children as required by court and contrary to her fellow workers' recommendation protected). At least one court in addition to *Morris* has refused to provide protection to an unusual situation of "compelled" testimony. *Padilla v. South Harrison R-II School District*, 181 F.3d 992 (8th Cir. 1999) (no protection for compelled testimony in the sense of cross-examination over objections by school teacher in the course of a criminal proceeding against him for sexual contact with a student in which the teacher testified that such relations may be acceptable in certain circumstances and that extramarital affairs were not problematic). The Third Circuit Court of Appeals has provided First Amendment protection to a public employee subpoenaed in a supervisor's divorce proceeding to testify to the supervisor's extramarital affair, concluding that

all testimony before any court or other fact-finding or adjudicatory body is entitled to such protection inherently. *Pro v. Donatucci*, 81 F.3d 1283 (3rd Cir. 1996).

This collection of decisions reveals that there are two hotly competing principles at play and that this Court should accept this petition to reconcile them properly and to direct an approach consistent with this Court's mandate in *Pickering, supra* and *Connick, supra* that it is only speech "as a citizen" that is entitled to protection. On the one hand, speech in the context of sworn testimony raises the concern for the protection of the judicial or adjudicative process and, of course, any legislative oversight process. As expressed by the court in *Pro*, 81 F.3d at 1288-91, there is a significant interest in obtaining complete and truthful testimony from public employees called to testify and that interest can be harmed if the employees must be concerned about retaliation.

On the other hand, particularly in the context of an employee called to provide testimony that reflects upon the activities of his or her office or agency, the government employer has a significant interest in ensuring that employees do not speak in a way that harms or undermines the legitimate activities and goals of a government agency. The seventh circuit below, in fact, recognized that even in the context of Morales' compelled deposition testimony this interest was as much present as in his statements to the prosecutor about the investigative and arrest efforts relating to Vincent Ray. "The purpose of *Garcetti* was to allow government employers greater influence over

speech that owes its existence to a public employee's professional responsibilities and that is damaging to the government's capacity to conduct public business." Appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, page 16. The seventh circuit then acknowledged that because the substance of Morales' speech to the prosecutor and in the deposition was "the same, it poses the same threat to the [Milwaukee Police Department] regardless of whether it is said" to the prosecutor or in the deposition. *Id.* It deemed it an "oddity" that "speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected." *Id.*

It is clear that the appellate courts below are struggling with the question of where to draw the line in protecting certain public employee speech uttered in sworn testimony or in statements to courts. This case provides this Court with the opportunity to direct clearly those circumstances under which such speech may or may not be protected. Jones, Ray and the City submit that the line should properly be drawn in accordance with this Court's earlier directive that only speech that is uttered "as a citizen" should receive protection. *Connick, supra.* When a public employee is compelled to provide testimony recounting his or her professional activities, the employee is not speaking "as a citizen" but, rather, consistent with public expectations of the proper execution of the employee's responsibilities. On the other hand, when a public employee voluntarily seeks

to testify as to his or her position about the operation of a government entity, he or she is engaging in just that type of speech to which the average citizen is entitled. Such a rule, of course, leaves protected other types of compelled testimony that has nothing to do with the employee's performance of duties, like the testimony about an extramarital affair at issue in *Pro*.

It is not, furthermore, sufficient to leave this question up to the balancing test under *Pickering*. The test is inherently subjective, may be difficult to frame correctly, and therefore subject to different interpretations of the government's interest versus that of the importance of the subject of the speech. The dissent in this case reflects some of that kind of difficulty. The dissenter characterizes Morales' deposition testimony as "motivated by a desire to bring to light possible government corruption." Appendix to the petition for a writ of certiorari filed by Alfonso Morales and David Kolatski, page 32. As noted previously, this characterization completely ignores that the prosecutors had established long before Morales raised his right hand in the deposition that Mullarkey's allegations were groundless. This characterization, however, improperly adds much weight to one side of any weighing of the employee's interest in speaking as opposed to that of the city's. Such an issue can only be avoided by establishing a bright-line rule that speech that a public employee is compelled to utter and which recounts his or her public functions is unprotected. This petition presents the Court

with the opportunity to resolve this important question of federal law.

Respectfully submitted,

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